

ALCOHOLIC BEVERAGE CONTROL ACT: DEFINITIONS AND GENERAL PROVISIONS.

ADMINISTRATION OF GOVERNMENT GENERALLY: PERSONNEL ADMINISTRATION — VIRGINIA FREEDOM OF INFORMATION ACT — PRIVACY PROTECTION ACT OF 1976 — DEPARTMENT OF EMPLOYEE RELATIONS COUNSELORS.

Intent of FOIA's exclusions and limited disclosures is to permit exercise of discretion by government agency in denying access generally to its records containing information that, if released, would hinder investigations of alleged government employee misconduct and would invade privacy of employees who may be subjects of such investigations. Requiring ABC employees interviewed in connection with agency investigation of another ABC employee to keep investigation confidential furthers this goal. Confidentiality requirement restricting employees' freedom of speech, which may be valid under state law or agency policy/procedure, must be constitutionally valid; requires balancing of employees' right to speak on issues of public concern with government employer's interest in performing public services through its employees. ABC requirement that employees comply with confidentiality requirement and be subject to disciplinary sanctions for knowingly disclosing protected information in connection with investigation of alleged employee misconduct is not violative of freedom of speech rights. ABC's determination that confidentiality requirement will aid its investigations of allegations of employee misconduct and protect its employees from adverse effects of unfounded charges is entitled to deference.

The Honorable John S. Reid

Member, House of Delegates

August 31, 1998

You ask several questions regarding a confidentiality statement that you have been informed the Office of Professional Standards ("OPS") of the Department of Alcoholic Beverage Control ("ABC") requires agency employees to sign when they are interviewed in connection with internal investigations of complaints and allegations of misconduct by agency employees.

The form, titled "Confidentiality of Professional Standards Investigations," notifies an employee that he is being interviewed pursuant to an investigation conducted by OPS. The form instructs the employee not to discuss the investigation with anyone. It further advises the employee that if he knowingly discloses any information relative to the case, he will be subject to disciplinary action under the standards of conduct procedures. The employee must acknowledge that he has read the statements and understands his responsibilities and sign and date the form in the presence of a witness. You indicate that several employees have questioned the legality of the confidentiality form, although you do not specify the basis for the challenge.

You present three purposes served by maintaining the confidentiality of investigations. First, the confidentiality requirement protects subjects of the investigations from unfounded allegations. Second, because every complaint does not identify a specific person, the requirement enables investigators to develop information to identify the person without alerting the person. Third, the confidentiality requirement furthers the investigation by preventing the contamination that could result from witnesses discussing the case with each other before all witnesses have been interviewed.

Section 4.1-101 of the *Code of Virginia*, a portion of the Alcoholic Beverage Control Act,¹ provides that "[t]he Department of Alcoholic Beverage Control ... consist[s] of the Virginia Alcoholic Beverage Control Board and the agents and employees of the Board." Persons who sell alcoholic beverages at government stores are employees of the Virginia Alcoholic Beverage Control Board (the "Board") and are to carry out the provisions of Title 4.1 in the sale of alcoholic beverages.² As state employees not exempt under § 2.1-116 of the Virginia Personnel Act,³ the employees also are to perform their duties in accordance with the standards of professional conduct promulgated by the Department of Personnel and Training and any supplements to the standards promulgated by the Board.⁴

While you state that the confidentiality form is used by OPS in connection with internal investigations of agency employees, you do not indicate whether the confidentiality requirement constitutes a supplemental standard of professional conduct promulgated by the Board.⁵ You also do not describe any particular investigation or specify whether, within ABC's organizational structure, OPS conducts administrative investigations or criminal investigations of employees of the Board. My response, therefore, is limited to a general consideration of the legality of imposing a confidentiality requirement on employees interviewed in connection with internal agency investigations. I note, however, that the validity of any particular confidentiality requirement may depend on whether the investigation relates to administrative or criminal matters.

The Virginia Freedom of Information Act⁶ ("FOIA") represents the Commonwealth's general policy regarding a government agency's authority to maintain the confidentiality of its operations. Section 2.1-342(B)(1) of FOIA excludes from mandatory disclosure "[m]emoranda, correspondence, evidence and complaints related to criminal investigations"; § 2.1-342(B)(6) excludes "[m]emoranda, working papers and records compiled specifically for use in litigation or as a part of an active administrative investigation concerning a matter which is properly the subject of an executive or closed meeting under § 2.1-344 and material furnished in confidence with respect thereto." Section 2.1-344(A)(1) authorizes a closed meeting for the purpose of considering the performance or disciplining of a specific employee of any public body.

In addition, § 2.1-342(B)(3) of FOIA excludes from mandatory disclosure "personnel records containing information concerning identifiable individuals." While § 2.1-342(B)(3) requires that access to personnel records not be denied to the subject of the record, § 2.1-116.05(F) provides that information related to a grievance and pertaining to other employees "shall be produced in such a manner as to preserve the privacy of the individuals not personally involved in the complaint or dispute." Similarly, § 2.1-342(B)(45) provides that information from records of completed investigations be disclosed "in a form that does not reveal the identity of complainants, persons supplying information or other individuals involved in the investigation." The section also restricts releasing the identity of the person investigated when the investigation does not lead to corrective action.

It is my opinion that these provisions of FOIA represent a legislative intent to permit an agency to exercise the discretion to deny access generally to information within an agency's records that, if released, would hinder investigations of alleged misconduct by government employees and would invade the privacy of the employees who may be the subjects of such investigations.⁷ Requiring employees who are interviewed in connection with an agency investigation of another employee

to maintain the confidentiality of the investigation furthers this legislative goal. The final determination of the validity of a confidentiality requirement, however, including the imposition of disciplinary action for violating the requirement, will depend on the surrounding facts and circumstances.

Regardless of whether a confidentiality requirement is valid under state law, an agency policy or procedure restricting employees' freedom of speech also must be valid under the First Amendment to the Constitution of the United States. This determination requires a balancing of the employee's right, as a citizen, to speak on issues of public concern, and the government's interest, as an employer, to effectively perform its public services through its employees.⁸ As an employer, the government has a greater interest in regulating the speech of its employees than, as a sovereign, it has in regulating the speech of its citizens.⁹ Government employees do not, however, relinquish their rights as citizens to speak on matters of public concern when they accept government employment,¹⁰ and any restriction on the speech of a government employee begins with an analysis of whether the speech involves a matter of public concern.¹¹ If the speech involves a matter of public concern, the restriction will be weighed against the injury the speech could cause to "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."¹² When the speech does not involve an issue of public concern, the government, as an employer, is granted broad discretion in the management of its personnel and internal affairs.¹³

Challenges to government restrictions on the speech of its employees are highly fact-specific, and the United States Supreme Court has refused to establish a standard applicable in all circumstances.¹⁴ While additional facts could direct a different conclusion, it is my opinion that requiring an employee to comply with a confidentiality requirement in connection with ABC's investigation of the alleged misconduct of another employee and subjecting an employee to disciplinary sanctions for knowingly disclosing protected information does not violate the employee's First Amendment rights.¹⁵ No facts provided by you indicate that the speech involves an issue of public concern. Further, the agency's determination that the confidentiality requirement will aid its investigations of allegations of employee misconduct and will protect its employees from the adverse effects of unfounded charges is entitled to deference.¹⁶

¹Sections 4.1-100 to 4.1-517.

²Section 4.1-119(C). Pursuant to § 4.1-105, the Board and agents and employees designated by the Board have the same power to enforce the provisions of Title 4.1 and the criminal laws of the Commonwealth "as is vested in the chief law-enforcement officer of a county, city, or town."

³Sections 2.1-110 to 2.1-116.

⁴See § 2.1-114.5; *Standards of Conduct Policy*, DPT Pol. & Proc. Manual (1993) (on file with Department of Personnel and Training).

⁵"With the prior written approval of the Director of the Department of Personnel and Training, agencies may supplement this policy to accommodate their specific needs as long as any supplemental agency policies are not inconsistent with the policy." *Standards of Conduct Policy*, DPT Pol. & Proc. Manual, *supra* § X(A)(1), at 14. Moreover, the General Assembly has designated the Department as the final authority in determining the validity of agency personnel policies. See § 2.1-114.5(13) (Director of Department of Personnel and Training shall have final

authority to establish and interpret personnel policies and procedures); 1982-1983 Op. Va. Att'y Gen. 134, 136.

⁶Sections 2.1-340 to 2.1-346.1.

⁷See Op. Va. Att'y Gen.: 1983-1984 at 314, 315 (effort should be made to maintain spirit of privacy intended by General Assembly in authorizing private grievance hearing); 1978-1979 at 242, 242 (whether to release or disseminate investigative report is within discretion and policy of agency; decision to be made on case-by-case basis). The Privacy Protection Act of 1976, §§ 2.1-377 to 2.1-386, also prohibits the disclosure of certain personal information regarding an employee without the written consent of the employee. While § 2.1-382 of the Privacy Protection Act requires an agency to provide access to information regarding an investigation to the person who is the subject of the investigation, including statements made by collateral sources, the information does not include disclosing the identity of the specific source of the information. See 1985-1986 Op. Va. Att'y Gen. 225, 226 (comparing § 2.1-382(A)(3)(a) with § 2.1-382(A)(3)(b)).

⁸See *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

⁹See *Waters v. Churchill*, 511 U.S. 661, 671 (1994); *Connick v. Myers*, 461 U.S. 138, 147 (1983).

¹⁰See *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967).

¹¹See *Connick v. Myers*, 461 U.S. at 147-48 (whether employee's speech addresses matter of public concern is to be determined by content, form and context of given statement, as revealed by entire record).

¹²*Pickering v. Board of Education*, 391 U.S. at 568.

¹³See *Connick v. Myers*, 461 U.S. at 146-48; *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974).

¹⁴See *Waters v. Churchill*, 511 U.S. at 671-75.

¹⁵See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (confidentiality rule that imposes criminal sanctions on parties not involved in proceedings before state judicial commission violates First Amendment; state's interest can be protected through internal procedures assuring confidentiality of proceedings); see also *Butterworth v. Smith*, 494 U.S. 624, 626 (1990) (Florida statute prohibiting grand jury witness from disclosing own testimony after term of grand jury had ended violates First Amendment).

¹⁶You ask also whether, even if there is no problem generally with requiring employees to maintain the confidentiality of internal investigations, the present form is defective in any way. Whether there is any defect in the form will depend on the manner in which the form is applied in the particular investigation and whether the ban on disclosure furthers the governmental interest. This is primarily an agency determination to be made on a case-by-case basis. See *Waters v. Churchill*, 511 U.S. at 671, 673-74 (whether First Amendment requires additional procedural safeguards depends on context; greater deference is given to government prediction of harm from employee speech than to government prediction of harm from speech of public at large). A prior opinion of the Attorney General considers the constitutionality of a policy subjecting to disciplinary action employees of a local department of social services who make complaint or express dissatisfaction to the local board of supervisors or the public without first addressing their complaint to their immediate supervisor. 1989 Op. Va. Att'y Gen. 43. The opinion concludes that

the policy was unconstitutionally overbroad because it would encompass statements of public concern without regard to whether such communication would interfere with the regular and efficient operation of the agency. *Id.* at 45. At the request of ABC, my Office will be glad to review and provide legal advice on any confidentiality form ABC wishes to adopt within the factual context in which the form will be used. The general analysis contained in this opinion should not be viewed, however, as a legal endorsement of the form, regardless of the factual context.